

# The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue

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Petra Bård , Wouter van Ballegooij Mo 2 Jul 2018

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On 28 June 2018, Advocate General Evgeni Tanchev delivered his Opinion in the Case C-216/18 PPU *Minister for Justice and Equality v LM* on the surrender of a crime suspect to Poland.

The issue is whether Mr. Artur Celmer, referred to by the Opinion as LM, should be surrendered from Ireland to Poland when there are serious doubts as to whether he would receive a fair trial, due to the alleged lack of independence of the judiciary resulting from recent changes to the Polish judicial system.

More specifically, does the executing judicial authority have to follow earlier jurisprudence of the CJEU developed in *Aranyosi and Căldăraru* when deciding on whether or not to postpone the execution of a European Arrest Warrant (EAW)? If yes, a further issue is

whether the executing judiciary has to engage in a two-stage examination, as suggested in *Aranyosi*, or whether the *LM* case should be distinguished and thus the applicable judicial test accordingly modified.

## 1. Upholding the rule of law; under Article 7 TEU and within the context of surrender procedures

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AG Tachev's Opinion correctly distinguishes the present case from the procedure conducted according to Article 7 TEU, like the one triggered against Poland on 20 December 2017. The High Court of Ireland already emphasized the political nature of the latter proceeding, and it came to the conclusion that the *outcome* of an Article 7 procedure is less relevant for a national court deciding on surrender. Instead, documents produced during the *process* may serve as persuasive evidence.

The AG, however, identified other differences, from which two will be singled out here. First, he argued that the two procedures do not have the same objectives. Under Article 7(1) TEU, the Council assesses whether there is a clear risk of a serious breach of the values referred to in Article 2 TEU, whereas a decision on surrender, concerned "the examination by the executing judicial authority [of] the existence of a real risk of breach not of a value common to the Member States but of a fundamental right". (paragraph 38) This statement gives the false semblance that fundamental rights are somehow not common values. The contrary is true: the EU is founded on a fundamental rights culture, as underlined by Article 2 TEU.

Second, the Opinion contends that the application of the Framework Decision on the EAW may only be suspended in line with Recital (10), if the sanctioning prong of Article 7 TEU is made use of and the Council determines a breach, and not just a mere *risk* of a breach of values listed in Article 2 TEU. In contrast, he recalls the *Aranyosi* doctrine, where a real risk of a breach of a fundamental right was permitted to potentially lead to the suspension of actual surrender cases (paragraphs 41-44). One could, however, argue that the drafters of the Framework Decision on the EAW meant to refer to Article 7 as such, which had only two paragraphs when the Framework Decision was drafted. In the meantime, a third, preventive arm has been added, which should now be read into Recital (10).

## 2. *LM* turned into *Aranyosi* 2.0

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Differentiating between the two procedures leads the AG to conclude that the national court has to decide whether or not to execute a European Arrest Warrant even if an Article 7 procedure is pending. Albeit on different grounds – and here we tend to agree with the High Court of Ireland, emphasising the political nature of Article 7 – this conclusion is correct.

However, we disagree with the AG's argument that the only alternative to an Article 7 TEU procedure resulting in the suspension of instruments based on mutual trust is the executing national authority following the *Aranyosi* doctrine. Instead, the AG's Opinion could have followed the CJEU's case law in *Associação Sindical dos Juizes Portugueses*, where the

CJEU emphasised the importance of the national judiciary for the enforcement of EU law, and entrusted itself to assess the judicial independence of those national courts which apply and interpret EU law.

The AG's Opinion should have acknowledged that a lack of judicial independence jeopardizes all fundamental rights, not just the right to a fair trial singled out here. Once the case was approached from a rule of law perspective, the Opinion could have proposed a freezing mechanism that we suggested in our previous blog entry and that is also advocated by Professors Carrera and Mitsilegas. As further discussed below, all further weaknesses of the Opinion flow from this fundamental misconstruction of the issue as a human rights problem instead of a rule of law matter.

## 2.1 First prong of *Aranyosi* and a “flagrant denial of justice” test

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In *Aranyosi*, the CJEU established a two-prong-test for checking the general fundamental rights situation in a country and the potential risks of human rights violations in the individual case. Once the obligation for the executing judicial authority to employ the *Aranyosi* test was established, the question arose to what extent this jurisprudence was applicable, when a derogable right was at stake, such as the right to a fair trial, and not an absolute one, like the prohibition of inhuman or degrading treatment.

In the AG's view, a derogable right may still be capable of giving rise to an obligation to postpone the execution of EAWs, if certain conditions are met (paragraphs 57-58). The Opinion stressed that the right to a fair trial may be subject to limitations, unless these limitations are so severe that the *essence* of that right is violated. Therefore, in the AG's view in order for the executing authority to postpone surrender, there must be a real risk not of a breach of the right to a fair trial, but of a “flagrant denial of justice” (paragraphs 72-77).

However, the AG does not cite the warning of AG Sharpston in *Radu*: “such a test [...] seems to me unduly stringent. [...] a trial that is only partly fair cannot be guaranteed to ensure that justice is done.” Additionally, recent CJEU case-law suggests that the standard of proof shall be lower than a real risk of a flagrant denial of justice.

AG Trachev, however, looks at a different jurisdiction and underpins his position by the case-law of the European Court of Human Rights (ECtHR). For an example for a successful determination of a flagrant denial of justice, the AG recalls rather extreme cases involving complicity with torture (paragraph 92). The AG admits that these judgments are, to date, the only ones where the ECtHR has found a breach of the Convention on account of the lack of independence and impartiality of the courts (paragraph 94). In other words, if the AG's Opinion was to be followed, there would be virtually no situations where a flagrant breach could be determined.

Such a reading leads to the rather absurd conclusion that if there is a risk of a human rights violation due to inhumane prison conditions (like in *Aranyosi*), surrender may be postponed. On the other hand, the bar for establishing a violation of fair trial rights due to systemic rule of law problems is put so high that there is virtually no way for it to be met except in situations in which Member States are complicit in the torture of individuals.

## 2.2 Second prong of *Aranyosi*

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As to the second prong of the test, several legal issues arose. One of the most fundamental ones was whether this part of the test is even applicable. The Irish High Court's suggestion was that it would be unrealistic to require a suspect to establish that deficiencies of a legal system have an effect on the proceedings to which he is subject. In contrast, the AG Opinion required to be proven that the individual concerned is exposed to a risk of flagrant denial of justice.

In the AG's view, an Article 7(1) TEU procedure alone does not prove that suspects automatically have a real risk of breach of their right to a fair trial. In his opinion, "it cannot be ruled out that, in certain situations, the courts of that Member State are capable of hearing a case with the independence required by the [...] Charter" (paragraph 103). Inspired by the Commission's arguments, the Opinion concludes that even if the first prong of the *Aranyosi* test is satisfied, "this cannot be taken to mean that *no* Polish court is capable of hearing *any case whatever* in compliance with the second paragraph of Article 47 of the Charter" (paragraph 108, emphasis in original). Again, the Opinion invokes extremely severe human rights violations that are unthinkable in intra-Community cases. It references *Mo.M. v. France*, where the examination of the Applicant's personal situation has shown that his sending back to Chad, which he had fled after being arrested and tortured by the Chadian authorities, would have breached the ECHR (paragraph 110).

When determining this second issue, the Opinion gives some guidance. The executing judicial authority has to take account of the particular circumstances of the case, relating both to the individual concerned (e.g. whether he or she "is a political opponent or belongs to a social or ethnic minority that is discriminated against") and to the crime in question (e.g. whether the offence is political in nature, has been committed in exercise of free speech, or has been the subject of public declarations by representatives of those in power) (paragraphs 103, 113, 114).

Criticism may be formulated with regard to the above requirements.

First, if one of the above issues can be proven, it is probably not the *Aranyosi* test that would be applicable. Recital (12) of the Framework Decision states that "nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person [...] when there are reasons to believe [that the] arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons." This recital could be used to interpret Article 1(3) of the Framework Decision on the EAW, and thereby the surrender procedure could be halted on the basis of that provision alone without making use of the *Aranyosi* test.

Second, the term "political opponent" is rather vague and might be difficult to prove. One shall be reminded that illiberal regimes go after anyone who formulates government criticism including journalists fighting fake news, members of the academia proving scientific facts and NGO representatives advocating human rights, irrespectively of whether they are politically active or not. Third, institutional discrimination is very difficult to prove. Fourth, the above test does not fully grasp the nature of constitutional capture. Indeed, political opponents may be silenced, and disadvantaged groups, such as the Roma or

asylum seekers may be further discriminated. But it cannot be concluded that apart from these groups, most suspects may get a fair trial. Capture of the judiciary involves in-built corruption. It also gives a free hand to organised crime, perhaps even leading to the situation that one would rather not want to surrender an individual to a certain Member State because it might lead to impunity.

## 2.3 Burden of proof, acquisition of evidence

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According to the AG's Opinion, the burden of proof is on the individual concerned to establish that there are substantial grounds to believe that there is a real risk of a flagrant denial of justice in the issuing state in his or her case. When deciding on this issue, the executing authority has to consider objective, reliable, specific and properly updated information. The Commission's reasoned proposal to have Article 7 TEU triggered can be taken into account, if that document is read in conjunction with any legislative changes passed after the reasoned proposal had been adopted. These requirements mix up the responsibilities of the Commission as guardian of the rule of law and individuals who do not possess an apparatus demonstrating risks to their fundamental rights. At a certain point the onus should shift to the state accused of rule of law violations.

Finally, the AG Opinion's requirement that the executing authority shall acquire from the issuing judicial authority all the necessary supplementary information (paragraphs 122-128), presupposes that a captured court would be capable of engaging in a judicial dialogue about its own and its peers' independence.

## 3. Conclusion

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The legal construction of a problem determines the solution found. The above assessment of AG Tachev's Opinion is a demonstration of why a lack of judicial independence should be framed as a rule of law issue. The AG Opinion's construction of the case as a potential human rights deficiency renders challenges to rule of law violations hypothetical. Against the backdrop of the current limitations, the suggestion to address rule of law problems in fully-fledged Article 7 (2)-(3) procedures is not feasible; whereas the alternative path, the modified two prong *Aranyosi* test, is incoherent and not workable in practice. Shall the AG Opinion's line of argumentation be adopted by the CJEU, its guidance for national courts is likely to result in impunity for Member States violating the rule of law, as well as individual exposure to fundamental rights infringements. This again might lead certain national executing judicial authorities to develop their own tests, trumping or endangering the primacy and effectiveness of EU law.

The above controversy serves as a reminder that "mutual trust cannot survive when one national system ceases to be governed by the rule of law" (see the blog post by Professors Scheppele and Pech). Should the EU shy away from creating a working monitoring and supervisory mechanism for Article 2 TEU values – which national courts could take into account when assessing whether mutual trust is still deserved – it will neither uphold EU law's autonomy, nor the values behind EU integration. And *vice versa*: reinforcing the EU's distinct constitutional features via a strong rule of law supervision would reinforce mutual trust.

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